

LYNN E. ERICKSON

IBLA 72-317

Decided February 22, 1973

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting appellant's application to purchase and canceling headquarters site claim Anch. 064010.

Affirmed.

Alaska: Headquarters Sites

An application for a headquarters site for a commercial fishing operation must be rejected where the applicant fails to show that he is using the site in connection with a productive industry as required by law at the time he filed his application to purchase. The term "productive industry" is not so broad as to include within its meaning an operation such as the applicant's endeavor, where the applicant admits that he was actively engaged in fishing operations for only the first season after the claim was initiated, the gross receipts from the operation were meager, and the enterprise was discontinued and the boat sold.

APPEARANCES: Lynn E. Erickson, pro se.

OPINION BY MR. STUEBING

Lynn E. Erickson appeals from a decision of the Alaska State Office, issued February 3, 1972, rejecting his application to purchase a headquarters site filed pursuant to the Act of March 3, 1927, 44 Stat. 1364, as amended, 43 U.S.C. § 687a (1970). The rejection was based upon a finding that Erickson had not shown in his application to purchase that he was using the land as his headquarters for a productive industry as required by law. In this decision, the State Office also canceled the appellant's claim because he had failed to file an acceptable application to purchase before the expiration of the statutory life of the claim. 1/

Appellant filed his notice of location on November 29, 1965, for a site comprising five acres of unsurveyed land located on an island in Lake Iliamna. the Bureau of Land Management acknowledged the claim on January 14, 1966. Appellant filed his application to purchase and petition to survey on September 28, 1970. He described the nature of his business as a commercial fishing (salmon) operation which included drift gill netting and shore set netting on both a

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1/ The State Office erred in stating that appellant's claim expired on September 28, 1970. The correct expiration date was November 29, 1970. Since appellant's application to purchase was filed on September 28, 1970, he has met the time requirement of the law. 43 CFR 2563.1-1(10)(c).

personal and partnership basis. Appellant explained that the location of this site was particularly advantageous to his operation because Lake Iliamna has a direct water route to the commercial fishing grounds on Bristol Bay which serves to eliminate a high-cost portage from Cook Inlet to Pile Bay.

Improvements on the site included a 12 x 16 foot cabin having a frame construction and metal roof, fish rafts, an outhouse, and a garbage pit. Appellant estimated the total value of these improvements at \$ 800. Included with the application to purchase were copies of his 1966 commercial fishing gear and vessel licenses and copies of receipts from the sale of fish to Kayler - Dahl Fish Company, Inc. Appellant admits that these are the only available records in regard to his business.

Appellant states that he and his brothers engaged in fishing operations in 1966. Although some fish was sold to Kayler - Dahl Fish Company that year, the operation was not a profitable venture. They suspended operations in 1967 because they could not contract with a buyer. They did, he says, use the site for storing equipment. In 1968, licensing regulations and lack of a buyer precluded operations. In 1969, appellant secured gear and a license and had a potential buyer. When this buyer refused to sign a written contract, appellant terminated his fishing activities. The following

year, he and his brothers dissolved the partnership and sold the boat. 2/

The State Office decision rejected the application because appellant did not show that he was using the site in connection with a productive industry at the time of filing his application to purchase. The following observations were noted in the decision. The field examination report stated that the improvements were built by local residents in the summer of 1970 and that the residents said they had no knowledge of Erickson's use of the land; Receipts from the sale of fish were signed by appellant's brother; Erickson admitted that he did not engage in fishing after 1966; The headquarters site settlement claim is located some 190 miles from the area where appellant last engaged in his commercial fishing venture in 1966.

Erickson filed a timely appeal in which he contends that he had taken the necessary steps to show compliance with the Act and that he had been engaged in a productive industry at the time of filing his application to purchase. He further alleges that the State Office's observations as set forth above create erroneous inferences.

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2/ From appellant's account of his business, it is unclear how he terminated his connection with the partnership. In a letter to the Bureau of Land Management dated December 22, 1971, appellant states that the partnership was dissolved and the boat sold the previous year. In his appeal dated February 25, 1972, appellant says that the interests which he had held in the partnership at the time he filed his application to purchase, were subsequently sold and transferred as of the date of the appeal.

The main issue for determination is whether appellant is qualified to purchase the site for use in connection with a productive industry within the meaning of the Act and regulations issued pursuant to the Act.

43 U.S.C. § 687a (1970) states that a citizen of the United States who is engaged in a trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands as a headquarters site under the rules and regulations prescribed by the Secretary of the Interior.

43 CFR 2563.1-1 states, among other requirements, that the applicant must show the actual use of the land for which he is applying and the nature of the trade, business, or productive industry.

The burden is on appellant, as the applicant for patent to land, to present evidence which shows compliance with the law and the regulations. Lee S. Gardner, A-30586 (September 26, 1966). The Government is not required to submit evidence to refute the evidence of the appellant, as Erickson implied in his appeal. Appellant contends that since he has submitted maps, records, photographs, and an explanation of his operation, he has met the requirements of the Act and the regulations. However, these materials do not prove that appellant was engaged in a productive industry when the application was filed. Conversely, appellant concedes in a letter to the Bureau on

December 22, 1971, that he was not engaged in commercial fishing after 1966 because he was unable to contract with a buyer.

Except for the income derived from the sale of fish in 1966 to Kayler - Dahl Fish Company, Inc., appellant offers no evidence of revenue from his fishing activities. He admits that his venture was a loss. He contends that the State Office inferred that the operation was fictitious because his brother signed the receipts for the sale of the fish to Kayler - Dahl. Regardless of who signed the receipts, they do not show a sufficient amount of income to indicate a going operation. The term "productive industry" cannot be construed so broadly as to include within its meaning an enterprise of such short duration with such meager gross receipts as appellant's operation. Lee S. Gardner, supra. Although the law does not require that an applicant show that his operation was profitable, some trade is a necessary indication of a productive industry. Kathleen M. Smyth, 8 IBLA 425 (1972); Lee S. Gardner, supra; cf. James E. Allen, A-30085 (February 23, 1965).

Appellant does not show that he resumed fishing activities after 1966; nor has he proved that he was engaged in a productive industry at the time he filed his application to purchase. 3/ Use of the site in connection with a productive industry at the time the application is

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3/ At all times from the inception of the claim Lynn E. Erickson's address of record has been Bismarck, North Dakota, where, correspondence indicates, he serves that State as Assistant Attorney General.

filed is critical to the issuance of a patent and failure to prove such use precludes the granting of patent. Appellant states that his partnership was still in effect on the day he filed his application, although it was subsequently dissolved. However, this partnership agreement, by itself, does not constitute a trade, manufacture or productive industry.

The inferences which appellant contends are erroneous in the State Office's decision have no effect upon the holding that the application must be rejected. The decisive issue in this case is whether appellant has proved that he was using the site in connection with a productive industry at time of application. This he has failed to prove. It is of no consequence who built the improvements if it cannot be shown that they were used in connection with a going operation; nor does it matter whether the residents of the locality had knowledge of appellant's use of the land. It is also of no significance that the site was located 190 miles from the principal area of commercial fishing. We do not deny the possibility that appellant could have used the site in connection with the conduct of commercial fishing operations at that distance, but the fact remains that he was not engaged in any productive commercial endeavor involving the use of the site after the first year. This conclusion is not a disputed fact, being based on his own statements made in conjunction with his application to purchase. It is therefore not a matter for determination at a hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member



